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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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9 GREGORY D. BOLIN,
10 Petitioner,

11 vs.

12 RENEE BAKER,¹ *et al.*,
13 Respondents.
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) 3:07-CV-00481-RLH-VPC
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ORDER

15 On November 8, 2010, respondents filed a motion to dismiss with respect to petitioner
16 Bolin's second amended petition for writ of habeas corpus. Docket #59. Respondents contend that
17 all of the numbered claims in the petition are either partially or wholly unexhausted. In addition,
18 respondents argue that several claims are untimely under 28 U.S.C. § 2244, two claims are
19 procedurally barred, and one claim is not cognizable in a federal habeas proceeding. On August 12,
20 2011, Bolin filed an opposition to the motion to dismiss. Docket #87. Respondent's filed a reply on
21 September 12, 2011. Docket #89. For the reasons that follow, respondents' motion to dismiss shall
22 be granted in part and denied in part.

23 I. Procedural History

24 On July 15, 1996, a jury sitting in the state district court for Clark County, Nevada, returned a
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26 ¹ Renee Baker is substituted for her predecessor, E.K. McDaniel, as Warden of Ely State Prison.
Fed. R. Civ. P. 25(d).

1 verdict finding Bolin guilty of first-degree kidnaping, sexual assault, and first-degree murder. At the
2 conclusion of the penalty phase, the jury found three aggravating circumstances and no mitigating
3 circumstances. Bolin was sentenced to death.

4 On May 19, 1998, Bolin's convictions and death sentence were affirmed on direct appeal.
5 *Bolin v. State*, 114 Nev. 503, 960 P.2d 784 (1998). Bolin timely filed a motion for rehearing which
6 was denied on August 27, 1998, by the Nevada Supreme Court. His subsequent petition for a writ of
7 certiorari to the U.S. Supreme Court was also denied. *Bolin v. Nevada*, 525 U.S. 1179 (1999).

8 Bolin initiated state post-conviction proceedings on April 22, 1999. On July 28, 2005, the
9 state district court entered an Amended Findings of Facts, Conclusions of Law and Order denying
10 Bolin's state district court petition. The Nevada Supreme Court affirmed that denial of relief on June
11 22, 2007, and issued its remittitur on July 17, 2007. On November 19, 2007, Bolin filed a petition
12 for a writ of certiorari in the United States Supreme Court, which was denied on February 25, 2008.
13 *Bolin v. Nevada*, 552 U.S. 1231 (2008).

14 On October 15, 2007, Bolin filed the proper person § 2254 petition for writ of habeas corpus
15 that initiated his current case in the federal district court. On November 9, 2007, the district court
16 appointed the Federal Public Defender's Office (FPD) to represent Bolin during his federal habeas
17 corpus proceedings. On April 30, 2008, Bolin filed an amended petition. Docket #18. The FPD
18 was subsequently relieved as counsel due to an irreconcilable conflict. On February 6, 2009, Saor
19 Stetler was appointed as new counsel.

20 On July 30, 2009, petitioner filed the second amended petition for writ of habeas corpus that
21 is the subject of respondents' motion to dismiss. Docket #49.

22 II. Analysis

23 1. *Proper response to amended petition*

24 Even though this court's scheduling order specifically provides for such a response (docket
25 #46), Bolin argues that respondents' motion to dismiss should be denied because it is non-responsive
26 under Rules 4 and 5 of the Rules Governing Section 2254 Cases (Habeas Rules). According to

1 Bolin, respondents should be required to file an answer, rather than a motion to dismiss.

2 This argument is wholly without merit. The Ninth Circuit has held that there is no “blanket
3 bar against motions to dismiss” filed in response to habeas petitions. *White v. Lewis*, 874 F.2d 599,
4 603 (9th Cir. 1989). Moreover, when the Habeas Rules were amended in 2004, Rule 4 was changed,
5 in part, to “reflect[] that the response to a habeas petition may be a motion.” Habeas Rule 4,
6 Advisory Committee Notes on 2004 amendments. Because Rule 4 allows for a response other than a
7 formal answer under Rule 5, this court shall entertain respondents’ motion to dismiss.

8 2. *Timeliness*

9 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year
10 filing period for § 2254 habeas petitions in federal court. 28 U.S.C. § 2244(d)(1). The one-year
11 period begins to run from the latest of four possible triggering dates, with the most common being
12 the date provided by subparagraph (A) – *i.e.*, the date on which the petitioner’s state court conviction
13 became final (by either the conclusion of direct appellate review or the expiration of time for seeking
14 such review). *Id.* Statutory tolling of the one-year time limitation occurs while a “properly filed”
15 state post-conviction proceeding or other collateral review is pending. 28 U.S.C. § 2244(d)(2).

16 Respondents concede that Bolin’s initial petition (docket #2) and first amended petition
17 (docket #18) were timely under § 2244(d)(1). Respondents argue, however, that Bolin’s second
18 amended petition (docket #49) was filed well beyond the one-year period and that several claims in
19 that pleading are time-barred from federal court review because they do not “relate back” to the
20 earlier-filed petitions.

21 The Supreme Court’s decision in *Mayle v. Felix*, 545 U.S. 644 (2005), significantly limits a
22 habeas petitioner’s ability to have newly-added claims “relate back” to the filing of an earlier petition
23 and, therefore, be considered timely under 28 U.S.C. § 2244(d). In *Mayle*, the Court concluded that
24 the Ninth Circuit’s former relation-back standard under Federal Rule of Civil Procedure 15(c)(2)

1 (now Rule 15(c)(1)(B)),² which allowed an amendment to a habeas petition to "relate back" to the
2 date of the original petition "so long as the new claim stems from the habeas petitioner's trial,
3 conviction, or sentence," was too broad. *Id.* at 656-57. The Court held that an amended claim in a
4 habeas petition relates back for statute of limitations purposes only if it shares a "common core of
5 operative facts" with claims contained in the original petition. *Id.* at 663-64. The common core of
6 operative facts must not be viewed at too high a level of generality, and an "occurrence," for the
7 purposes of Fed. R. Civ. P. 15(c), will consist of each separate set of facts that supports a ground for
8 relief. *Id.* at 661.

9 Although they miscalculate the time during which this court tolled the limitations period to
10 allow for the appointment of new counsel,³ respondents are correct that the one-year limitation
11 period elapsed between the date on which Bolin filed his first amended petition (April 30, 2008) and
12 the date on which he filed his second amended petition (July 30, 2009). Bolin makes no argument
13 that the holding in *Mayle* does not affect the timeliness of claims in his petition, nor does he claim
14 that he is entitled to equitable tolling for any claim that does not "relate back" to his timely-filed
15 petitions. Thus, the court shall now turn to the claims identified as untimely by the respondents to
16 determine if they relate back to claims in Bolin's timely-filed petitions. *See Mayle*, 545 U.S. at 657.

17 *Claim Twenty-four.* In Claim Twenty-four, Bolin claims that his convictions and death
18 sentence violate his constitutional rights because he is "factually innocent" of capital murder. To
19 support this claim, Bolin alleges that he was convicted on based on flawed, unreliable, and
20 inadmissible evidence such as a 1975 rape and kidnaping conviction, an unconstitutionally
21 suggestive identification procedure, a faulty DNA analysis of "foreign" pubic hairs found on the
22 victim, and items obtain from his home and person in violation of the Fourth Amendment. He also
23 alleges in Claim Twenty-four that the police failed to preserve the pubic hair evidence for additional

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25 ² Effective December 1, 2007, former Fed. R. Civ. P. 15(c)(2) was amended for stylistic purposes
only and recodified as Fed. R. Civ. P. 15(c)(1)(B).

26 ³ The tolling period for this purpose ran from April 30, 2008 (not August 14, 2008, as argued by
respondents) until April 21, 2009. Docket #44.

1 testing and that the prosecution made unsubstantiated claims in closing arguments as to the statistical
2 probability that Bolin was the source of the hairs.

3 Claims Five, Seven, Eight, Nine, Twenty, and Twenty-five of Bolin's first amended petition
4 rely on the same operative facts as those that support Claim Twenty-four in the second amended
5 petition. As such, Claim Twenty-four relates back to the earlier pleading and is timely.

6 *Claim Thirty-two.* In Claim Thirty-two, Bolin claims that the Nevada death penalty scheme
7 is unconstitutional because it gives county prosecutors unlimited discretion in seeking the death
8 penalty unchecked by any state-wide uniform standards. This claim does not share a common core
9 of operative facts with any claim or claims contained in Bolin's initial petition or first amended
10 petition. Thus, the claim does not relate back and is untimely.

11 *Claim Thirty-four.* In Claim Thirty-four, Bolin claims that the Nevada death penalty statute
12 violates the Constitution because it lacks adequate standards for evaluating the appropriate sentence;
13 lacks safeguards to ensure that the sentencer focuses on permissible sentencing considerations; lacks
14 a mechanism to ensure the reliability of the sentence; has overlapping and vague aggravating
15 circumstances; uses overbroad, vague language; and depends on extensive, unguided prosecutorial
16 discretion. This claim shares a common core of operative facts with Claim Thirty in Bolin's first
17 amended petition. As such, the claim relates back to earlier pleading and is timely.

18 *Claim Thirty-five.* In Claim Thirty-five, Bolin claims that the Nevada death penalty scheme
19 is unconstitutional under the Supreme Court precedents established by *Jones v. United States*, 526
20 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); and *Ring v. Arizona*, 536 U.S.
21 584 (2002). This claim does not share a common core of operative facts with any claim or claims
22 contained in Bolin's initial petition or first amended petition. Thus, the claim does not relate back
23 and is untimely.

24 *Claim Thirty-six.* In Claim Thirty-six, Bolin claims that his death sentence is constitutionally
25 invalid because the State failed to allege the capital-eligibility factors in its charging document.
26 This claim does not share a common core of operative facts with any claim or claims contained in

1 Bolin's initial petition or first amended petition. Thus, the claim does not relate back and is
2 untimely.

3 *Claim Thirty-seven.* In Claim Thirty-seven, Bolin claims his death sentence is
4 constitutionally invalid because the elements of capital eligibility were not found beyond a
5 reasonable doubt. In support of this claim, Bolin alleges that the special verdict form returned by the
6 jury included a checked box indicating that the mitigating circumstances were not sufficient to
7 outweigh the aggravating circumstances, but did not indicate that the jury was convinced
8 unanimously or beyond a reasonable doubt that the aggravating circumstances substantially
9 outweighed the mitigating circumstances.

10 This claim does not share a common core of operative facts with any claim or claims
11 contained in Bolin's initial petition or first amended petition. Thus, the claim does not relate back
12 and is untimely.

13 *Claim Thirty-eight.* In Claim Thirty-eight, Bolin claims that his conviction and death
14 sentence are constitutionally invalid because of the lack of an impartial tribunal, specifically the trial
15 judge who displayed bias against the defense and for the prosecution. This claim does not share a
16 common core of operative facts with any claim or claims contained in Bolin's initial petition or first
17 amended petition. Thus, the claim does not relate back and is untimely.

18 *Claim Thirty-nine.* In Claim Thirty-nine, Bolin claims that the Nevada statute allowing first
19 degree murder to be aggravated only by enumerated circumstances is unconstitutionally vague, as
20 interpreted by the Nevada Supreme Court, because it permits introduction at the penalty phase of
21 "evidence outside the nine areas of aggravating circumstances." This claim does not share a
22 common core of operative facts with any claim or claims contained in Bolin's initial petition or first
23 amended petition. Thus, the claim does not relate back and is untimely.

24 *Claim Forty.* In Claim Forty, Bolin claims that Nevada's death penalty statute is
25 unconstitutional because it allows for the use of unspecified non-statutory aggravating
26 circumstances. This claim does not share a common core of operative facts with any claim or claims

1 contained in Bolin's initial petition or first amended petition. Thus, the claim does not relate back
2 and is untimely.

3 *Claim Forty-one.* In Claim Forty-one, Bolin claims that death sentence is constitutionally
4 invalid because Nevada law authorizes a reduced standard of reliability for admission of evidence at
5 the penalty phase of a capital trial. This claim does not share a common core of operative facts with
6 any claim or claims contained in Bolin's initial petition or first amended petition. Thus, the claim
7 does not relate back and is untimely.

8 *Claim Forty-two.* In Claim Forty-two, Bolin claims that death sentence is invalid because the
9 manner in which the jury is death qualified in Nevada, including in his case, violates several
10 constitutional provisions. In contrast to Claim One of his second amended petition, which focuses
11 on the manner in which the jury was death qualified in this particular case, Claim Forty-two
12 challenges the constitutionality of the death qualification standard in Nevada. This claim does not
13 share a common core of operative facts with any claim or claims contained in Bolin's initial petition
14 or first amended petition. Thus, the claim does not relate back and is untimely.

15 *Claim Forty-three.* In Claim Forty-three, Bolin claims that death sentence is invalid because
16 the death qualification of the jury in his case violated *the prospective jurors'* constitutional rights.
17 This claim does not share a common core of operative facts with any claim or claims contained in
18 Bolin's initial petition or first amended petition. Thus, the claim does not relate back and is
19 untimely.

20 *Claim Forty-five.* In Claim Forty-five, Bolin claims that his death sentence is constitutionally
21 invalid because the sentence is disproportional in light of the circumstances of the crime and the
22 character of the defendant. This claim does not share a common core of operative facts with any
23 claim or claims contained in Bolin's initial petition or first amended petition. Thus, the claim does
24 not relate back and is untimely.

25 *Claim Forty-eight.* In Claim Forty-eight, Bolin claims that the execution of his death
26 sentence after keeping on death row for an inordinate amount of time violates his rights under the

1 Eighth Amendment. This claim does not share a common core of operative facts with any claim or
2 claims contained in Bolin's initial petition or first amended petition. Thus, the claim does not relate
3 back and is untimely.

4 *Claim Forty-nine and Fifty.* In Claims Forty-nine and Fifty, Bolin claims, respectively, that
5 his mental impairments make him ineligible for a death sentence and would render his execution
6 unconstitutional. In Claim Thirty-five of his first amended petition and Claim Fifty-two of his
7 second amended petition, Bolin claims that his sentence of death is constitutionally invalid because,
8 although he "does not, at this time, assert that he is incompetent to be executed," he *may become*
9 incompetent by the time the sentence is to be carried out. Because they rely on a different set of
10 operative facts than Claim Thirty-five of the first amended petition and any other claim contained in
11 that pleading or Bolin's initial petition, both Claim Forty-nine and Fifty are time-barred.

12 *Claim Fifty-one.* In Claim Fifty-one, Bolin claims that his confinement and sentence are
13 unconstitutional because, throughout post-conviction proceedings, his mental disabilities have
14 impaired his ability to adequately understand the legal proceedings, and to aid and assist in his
15 defense. This claim does not share a common core of operative facts with any claim or claims
16 contained in Bolin's initial petition or first amended petition. Thus, the claim does not relate back
17 and is untimely.

18 3. Exhaustion

19 Exhaustion of state remedies is a prerequisite to a federal court's consideration of a petition
20 for a writ of habeas corpus. 28 U.S.C. §2254(b). To exhaust a ground for relief, a petitioner must
21 fairly present that ground for relief to the state's highest court, and must give that court the
22 opportunity to address and resolve it. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Keeney v.*
23 *Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The "fair presentation" requirement is satisfied when the
24 claim has been presented to the highest state court by describing the operative facts and the legal
25 theory upon which the federal claim is based. *See Anderson v. Harless*, 459 U.S. 4, 6 (1982);
26 *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983).

1 To fairly present a federal claim to the state court, the petitioner must alert the court to the
2 fact that he asserts a claim under the United States Constitution. *Hiivala v. Wood*, 195 F.3d 1098,
3 1106 (9th Cir. 1999) (citing *Duncan*, 513 U.S. at 365-66), *cert. denied*, 529 U.S. 1009 (2000). The
4 mere similarity of claims of state and federal error is insufficient to establish exhaustion. *Hiivala*,
5 195 F.3d at 1106, (citing *Duncan*, 513 U.S. at 366); *see also Lyons v. Crawford*, 232 F.3d 666, 668-
6 69 (9th Cir. 2000), *as modified by*, 247 F.3d 904 (9th Cir. 2001); *Shumway v. Payne*, 223 F.3d 982,
7 987 (9th Cir. 2000). The petitioner must have "characterized the claims he raised in state proceedings
8 *specifically* as federal claims." *Lyons*, 232 F.3d at 670. This is accomplished either by referencing a
9 specific provisions of the federal constitution or by citing to either a federal or state case involving
10 the legal standard for a federal constitutional violation. *See id.*; *Peterson v. Lampert*, 319 F.3d 1153,
11 1158 (9th Cir. 2003) (en banc). "[G]eneral appeals to broad constitutional principles, such as due
12 process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion."
13 *Hiivala*, 195 F.3d at 1106, (citing *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)); *see also*
14 *Shumway*, 223 F.3d at 987.

15 As noted, respondents contend that all of the claims in Bolin's second amended petition are
16 partially or wholly unexhausted. As discussed above, many of Bolin's claims are time-barred; thus,
17 the question whether these claims are exhausted is moot. In addition, Bolin concedes that Claims
18 One, Two, Three, Four, Twelve, Eighteen, Twenty, Twenty-Five, Forty-Three, Forty-Six,
19 Forty-Seven, Forty-Eight, Forty-Nine, Fifty, Fifty-One, Fifty-Two, and Fifty-Four have not been
20 exhausted. Docket #49, p. 22.

21 With respect to Claims Seven, Thirteen, Nineteen, Twenty-one, Twenty-two, Thirty, Thirty-
22 one, Thirty-two, Thirty-three, Thirty-four, Thirty-five, Thirty-six, Thirty-seven, Thirty-eight, Thirty-
23 nine, Forty, Forty-one, Forty-two, Forty-four, Forty-five, and Fifty-five, Bolin contends that these
24 claims should be deemed exhausted by virtue of the Nevada Supreme Court's duty to review death
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1 penalty cases under Nev. Rev. Stat. 177.055⁴ or its willingness to *sua sponte* review death penalty
 2 cases for constitutional error. In order to find any of Bolin's claims exhausted by virtue of the
 3 Nevada Supreme Court's review under Nev. Rev. Stat. 177.055, this court must be satisfied that such
 4 review encompassed the specific factual and a federal law grounds advanced by Bolin in his federal
 5 petition. *See Comer v. Schriro*, 463 F.3d 934, 954-56 (9th Cir. 2006) (examining whether
 6 petitioner's federal habeas claims were impliedly exhausted under the Arizona Supreme Court's
 7 independent review process).

8 In allowing implied exhaustion in *Comer*, the court of appeals noted that, pursuant to
 9 Arizona's statutes and case law, the Arizona Supreme Court "examines the entire record, particularly
 10 the sentencing hearing, to determine if any procedural errors occurred or other arbitrary factors
 11 influenced the sentencing court's decision to impose the death sentence," and that the court "is
 12 clearly conscious of its duty to respect the dictates of the Eighth and Fourteenth Amendments and to
 13 ensure that the death penalty is not imposed in an arbitrary and capricious fashion." *Id.* at 955. In
 14 addition, the court of appeals held that only claims that are "clearly encompassed within Arizona's
 15 independent review" and "readily apparent from the record" will be deemed impliedly exhausted.
 16 *Id.* at 956.

17 Here, neither the statute itself nor Nevada case law obligates the Nevada Supreme Court to
 18 apply federal law standards in conducting its review under Nev. Rev. Stat. 177.055. *Sechrest v.*
 19 *Ignacio*, 943 F.Supp. 1245, 1250 (D.Nev. 1996). Moreover, Bolin has not shown that any of the
 20 claims at issue is "clearly encompassed" within the scope of Nev. Rev. Stat. 177.055 or that any of
 21 them is "readily apparent" in the record reviewed by the Nevada Supreme Court. Consequently,
 22 none of Bolin's claims shall be deemed exhausted by virtue of Nev. Rev. Stat. 177.055.

23 With regard to the Nevada Supreme Court's purported willingness to *sua sponte* address a
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25 ⁴ Nev. Rev. Stat. 177.055 requires the Nevada Supreme Court, in death penalty cases, to review
 26 not only those errors actually asserted by the defendant on appeal, but also the sufficiency of the
 evidence supporting aggravating factors, whether the death sentence was imposed as a result of passion,
 prejudice, or any arbitrary factor, and whether the sentence was excessive.

1 potential constitutional violation, Bolin cites to *Bejarano v. State*, 801 P.2d 1388 (Nev. 1990). In
2 that case, the Nevada Supreme Court considered *sua sponte* whether trial counsel's failure to present
3 evidence of the appellant's personality disorders and a low intelligence as mitigating circumstances
4 constituted ineffective assistance of counsel. *Bejarano*, 801 P.2d at 1390. In doing so, the court
5 cited to the then-recent decision in *Deutscher v. Whitley*, 884 F.2d 1152 (9th Cir. 1989), a case in
6 which the Ninth Circuit found ineffective assistance of counsel based on similar circumstances.

7 Of course, simply because the state supreme court chose *sua sponte* to address a salient
8 constitutional issue in a particular case does not mean that the court considers such issues in all
9 capital cases. Indeed, the fact that Bolin cites to only one case suggests that *sua sponte* review of
10 constitutional issues is an exception, not a rule, for the Nevada Supreme Court. As such, this court
11 finds no merit to Bolin's argument that the Nevada Supreme Court's "practice" of reviewing cases
12 for constitutional error *sua sponte* effects exhaustion of claims that he did not present to the state
13 supreme court.

14 As for the claims in the second amended petition that are neither time-barred , nor
15 admittedly-unexhausted, the court finds as follows.

16 *Claim Five.* In Claim Five, Bolin claims that his conviction and death sentence are
17 unconstitutional because they are based on the admission of prior bad act testimony concerning a
18 1975 conviction. Bolin exhausted this claim in his direct appeal and his state post-conviction
19 proceeding. Docket #60-9, p. 25-41; docket #60-10, p. 2-14; docket #63-7, p. 19-21.⁵ However,
20 legal theories alleged in Claim Five other than violations of the Fifth, Sixth, and Fourteenth
21 Amendments remain unexhausted.

22 *Claim Six.* In Claim Six, Bolin claims that the Nevada Supreme Court violated his
23 constitutional rights by allowing the admission of prior bad act evidence. Bolin exhausted this claim
24 in his state post-conviction proceeding. Docket #63-7, p. 19-21. However, legal theories alleged in
25 Claim Six other than violations of the Fifth, Sixth, and Fourteenth Amendments remain

26 ⁵ Citations to the record herein use the CM/ECF pagination.

1 unexhausted.

2 *Claim Seven.* In Claim Seven, Bolin claims that his conviction and death sentence are
3 unconstitutional due to the improper admission of racially charged evidence and arguments
4 throughout the pretrial, trial and appellate stages of his case. This claim was never presented to the
5 Nevada Supreme Court and, therefore, remains unexhausted.

6 *Claim Eight.* In Claim Eight, Bolin claims he received ineffective assistance of trial counsel
7 due to counsel's failure to adequately challenge the introduction of illegally obtained evidence.
8 Bolin exhausted this claim in his state post-conviction proceeding. Docket #63-8, p. 22-23.
9 However, legal theories alleged in Claim Eight other than a violation of his right to effective
10 assistance of counsel under the Sixth and Fourteenth Amendments remain unexhausted.

11 *Claim Nine.* In Claim Nine, Bolin claims that his constitutional rights were violated by the
12 improper admission of scientific and statistical evidence. Bolin exhausted this claim in his direct
13 appeal and the appeal of his state post-conviction proceeding. Docket #60-11, p. 7-34; docket #63-7,
14 p. 24-30; docket #63-8, p. 2-5. However, legal theories alleged in Claim Nine other than violations
15 of the Due Process Clause and right to effective assistance of counsel under the Fifth, Sixth, and
16 Fourteenth Amendments remain unexhausted.

17 *Claim Ten.* In Claim Ten, Bolin claims that his conviction and sentence violate his
18 constitutional rights because the trial court arbitrarily admitted an unreliable eyewitness
19 identification of him. Bolin exhausted this claim in his direct appeal and the appeal of his state post-
20 conviction proceeding. Docket #60-10, p. 14-31; docket #63-8, p. 13-18. However, legal theories
21 alleged in Claim Ten other than violations of his right to due process, a fair trial, and effective
22 assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments remain unexhausted.

23 *Claim Eleven.* In Claim Eleven, Bolin claims that conviction and sentence violate his
24 constitutional rights because the State mishandled and destroyed crucial evidence in his case. The
25 evidence identified by Bolin in this claim consists of pubic hair combings from the victim and DNA
26 and fingerprint evidence from the bed of the victim's pickup truck.

1 Bolin raised claims in his state post-conviction proceeding in which he alleged violations of
2 his rights to due process, a fair trial, and effective assistance of counsel in relation to the State's
3 handling of the pubic hair evidence. Docket #63-8, p. 5-13. He never raised, however, a state court
4 claim related to the State's handling of evidence from the pickup truck. Consequently, Claim Eleven
5 is unexhausted as to those allegations. In addition, the claim is completely unexhausted as to legal
6 theories other than violations of the right to due process, a fair trial, and effective assistance of
7 counsel under the Fifth, Sixth, and Fourteenth Amendments.

8 *Claim Thirteen.* In Claim Thirteen, Bolin claims that his conviction and death sentence
9 violate his constitutional rights because the trial court admitted gruesome and prejudicial
10 photographs of the autopsy that rendered trial fundamentally unfair. This claim was never presented
11 to the Nevada Supreme Court and, therefore, remains unexhausted.

12 *Claim Fourteen.* In Claim Fourteen, Bolin asserts five ways in which his trial counsel's
13 performance during the guilt phase of his trial amounted to ineffective assistance of counsel: (a)
14 failure to communicate with each other with respect of voir dire and examining expert witnesses, (b)
15 failure to hire an investigator in a timely manner and promptly move to preserve physical evidence,
16 © failure to hire an institutionalization expert regarding future dangerousness, (d) failure to present a
17 defense to the State's argument as to Bolin's alleged "sexual aberration," and (e) failure to hire
18 mental health experts to evaluate Bolin's competence to stand trial and his mental state at the time of
19 the alleged crime. While Bolin raised several ineffective assistance of counsel claims in state court,
20 none of them were based on the same or similar factual allegations as any of these five sub-claims.
21 As such, Claim Fourteen is completely unexhausted.

22 *Claim Fifteen.* In Claim Fifteen, Bolin claims that his conviction and death sentence are
23 constitutionally invalid because the jury instructions at his trial failed to require the jury to find all of
24 the *mens rea* elements of first-degree murder. He cites specifically to jury instructions on
25 premeditation and implied malice. Bolin exhausted this claim in his direct appeal. Docket #60-12,
26 p. 7-15. However, legal theories alleged in Claim Fifteen other than violations of his constitutional

1 right to due process and a fair trial remain unexhausted.

2 *Claim Sixteen.* In Claim Sixteen, Bolin claims that his conviction and death sentence are
3 constitutionally invalid because the jury instruction on reasonable doubt given during both the guilt
4 and punishment phases of his trial improperly minimized the State's burden of proof. Bolin
5 exhausted this claim in his direct appeal. Docket #60-12, p. 2-6. However, legal theories alleged in
6 Claim Sixteen other than violations of his constitutional right to due process and a fair trial remain
7 unexhausted.

8 *Claim Seventeen.* In Claim Seventeen, Bolin claims that his conviction and death sentence
9 are in violation of his constitutional rights because the prior bad act instruction given at his trial
10 invited the jury to consider inadmissible character evidence. Bolin exhausted this claim in his direct
11 appeal and the appeal of his state post-conviction proceeding. Docket #60-11, p.35-41; docket #60-
12 12, p.2; docket #63-7, p. 21-22. However, legal theories alleged in Claim Seventeen other than
13 violations of the constitutional right to due process, a fair trial, and effective assistance of counsel
14 remain unexhausted.

15 *Claim Nineteen.* In Claim Nineteen, Bolin claims that his conviction and death sentence
16 violate his constitutional rights because the jury instructions defining torture, mutilation and
17 depravity of mind were overly broad and did not protect against the arbitrary and capricious
18 infliction of the death penalty. This claim was never presented to the Nevada Supreme Court and,
19 therefore, remains unexhausted.

20 *Claim Twenty-one.* In Claim Twenty-one, Bolin claims that his conviction and death
21 sentence violate his constitutional rights because the jury instructions did not properly instruct the
22 jury on the limited use of prior bad act evidence in the penalty phase and did not protect against the
23 arbitrary and capricious infliction of the death penalty. This claim was never presented to the
24 Nevada Supreme Court and, therefore, remains unexhausted.

25 *Claim Twenty-two.* In Claim Twenty-two, Bolin claims that his conviction and death
26 sentence violate his constitutional rights due to several instances of prosecutorial misconduct. This

1 claim was never presented to the Nevada Supreme Court and, therefore, remains unexhausted.

2 *Claim Twenty-three.* In Claim Twenty-three, Bolin claims that his conviction and death
3 sentence violate his constitutional rights due to the admission of cumulative and prejudicial victim
4 impact testimony at the guilt and penalty phases of his trial. Bolin exhausted this claim in his direct
5 appeal. Docket #60-12, p. 32-38. However, legal theories alleged in Claim Twenty-three other than
6 a violation of his constitutional right to due process remain unexhausted.

7 *Claim Twenty-four.* As noted above, Bolin asserts in Claim Twenty-four that his conviction
8 and death sentence violate his constitutional rights because he is “factually innocent” of capital
9 murder and, as support for the claim, alleges that he was convicted on based on flawed, unreliable,
10 and inadmissible evidence such as a 1975 rape and kidnaping conviction, an unconstitutionally
11 suggestive identification procedure, a faulty DNA analysis of “foreign” pubic hairs found on the
12 victim, and items obtain from his home and person in violation of the Fourth Amendment. While he
13 made several of the same factual allegations in state court, Bolin never presented the Nevada
14 Supreme Court with a “factual innocence” claim supported by a similar set of factual allegations. As
15 such, Claim Twenty-four is unexhausted.

16 *Claim Twenty-six.* In Claim Twenty-six, Bolin contends that his trial counsel’s performance
17 during the penalty phase of his trial amounted to ineffective assistance of counsel because counsel
18 failed to investigate and present mitigating evidence on his behalf and presented an outrageous
19 closing and improper closing argument. Bolin exhausted this claim in his state post-conviction
20 proceeding. Docket #63-8, p. 23. However, legal theories alleged in Claim Twenty-six other than a
21 violation of his constitutional right to effective assistance of counsel remain unexhausted.

22 *Claim Twenty-seven.* In Claim Twenty-seven, Bolin claims that his conviction and death
23 sentence violate his constitutional rights due to the trial court’s failure to sentence him on his other
24 convictions and failure to make a habitual criminal finding prior to the capital sentencing hearing.
25 Bolin exhausted this claim in his direct appeal. Docket #60-12, p. 22-32. However, legal theories
26 alleged in Claim Twenty-seven other than violations of the Fifth, Sixth, and Fourteenth Amendments

1 remain unexhausted.

2 *Claim Twenty-eight.* In Claim Twenty-eight, Bolin claims that his conviction and death
3 sentence violate his constitutional rights due to the State's failure to submit all of the elements of
4 capital eligibility to the grand jury or to the court for a probable cause determination. This claim was
5 never presented to the Nevada Supreme Court and, therefore, remains unexhausted.

6 *Claim Twenty-nine.* In Claim Twenty-nine, Bolin claims that his conviction and death
7 sentence violate his constitutional rights because his capital trial, sentencing, and review on direct
8 appeal were conducted by or before state-elected judges. This claim was never presented to the
9 Nevada Supreme Court and, therefore, remains unexhausted.

10 *Claim Thirty.* In Claim Thirty, Bolin claims that his conviction and death sentence violate
11 his constitutional rights due to the failure of the Nevada Supreme Court to conduct fair and adequate
12 appellate review. This claim was never presented to the Nevada Supreme Court and, therefore,
13 remains unexhausted.

14 *Claim Thirty-one.* In Claim Thirty-one, Bolin claims that his conviction and death sentence
15 violate his constitutional rights because the Nevada capital punishment system operates in an
16 arbitrary and capricious manner. This claim was never presented to the Nevada Supreme Court and,
17 therefore, remains unexhausted.

18 *Claim Thirty-three.* In Claim Thirty-three, Bolin claims that the Nevada death penalty statute
19 is unconstitutional because fails to truly narrow the categories of death-eligible defendants. This
20 claim was never presented to the Nevada Supreme Court and, therefore, remains unexhausted.

21 *Claim Thirty-four.* As noted above, Bolin asserts in Claim Thirty-four that the Nevada death
22 penalty statute violates the Constitution because it lacks adequate standards for evaluating the
23 appropriate sentence; lacks safeguards to ensure that the sentencer focuses on permissible sentencing
24 considerations; lacks a mechanism to ensure the reliability of the sentence; has overlapping and
25 vague aggravating circumstances; uses overbroad, vague language; and depends on extensive,
26 unguided prosecutorial discretion. This claim was never presented to the Nevada Supreme Court

1 and, therefore, remains unexhausted.

2 *Claim Forty-four.* In Claim Forty-four, Bolin claims that his conviction and death sentence
3 violate his constitutional rights because the death penalty is, in all circumstances, cruel and unusual
4 punishment. This claim was never presented to the Nevada Supreme Court and, therefore, remains
5 unexhausted.

6 *Claim Fifty-three.* In Claim Fifty-three, Bolin claims that his conviction and death sentence
7 violate his constitutional rights because his appellate counsel failed to raise substantial and
8 cognizable state and federal constitutional issues, and failed to raise all available grounds on his
9 direct appeal to the Nevada Supreme Court as detailed herein. Bolin sought relief in state court
10 based on his appellate counsel's allegedly deficient performance, but on far more limited grounds.
11 He challenged appellate counsel's failure to challenge "prior bad acts" evidence as both a violation
12 of state law and of his constitutional rights. Docket #63-7, p. 21-23. He also challenged counsel's
13 failure to challenge the State's suppression of potentially exculpatory evidence. Docket #63-8, p. 5-
14 10.

15 Consequently, Claim Fifty-three is exhausted only as to those two factual theories. Also,
16 legal theories alleged in Claim Fifty-three other than a violation of his constitutional right to
17 effective assistance of counsel remain unexhausted.

18 *Claim Fifty-five.* In Claim Fifty-five, Bolin claims that his conviction and death sentence
19 violate his constitutional rights because cumulative effect of all the errors and constitutional
20 violations in his case. "[A] cumulative error claim must be clearly identified in a petitioner's brief
21 before a state court to be exhausted." *Wooten v. Kirkland*, 540 F.3d. 1019, 1026 (9th Cir. 2008)
22 (citing *Solis v. Garcia*, 219 F.3d 922 (9th Cir. 2000)). Because Bolin failed to raise a cumulative
23 error claim with the Nevada Supreme Court, this claim is unexhausted.

24 *Treatment of unexhausted claims.* This court has determined that Bolin is not entitled to the
25 stay and abeyance procedure condoned by the Supreme Court in *Rhines v. Weber*, 544 U.S. 269
26 (2005). Docket ##77/80. *Rhines* contains a clear statement as to the treatment of a mixed petition

(i.e., a petition containing both exhausted and unexhausted claims) when a stay is not warranted:

. . . [I]f a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief. See [*Rose v. Lundy*, 455 U.S. 509, 520 (1982),] . . . (plurality opinion) (“[A petitioner] can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims”).

Rhines, 544 U.S. at 278. Therefore, Bolin will be provided the opportunity to abandon his unexhausted claims. If he does so, this case will proceed on his remaining exhausted claims. If he does not abandon his unexhausted claims, his entire petition shall be dismissed under *Rose v. Lundy*.

4. Cognizability

Claim Twenty-four. Respondents argue that Bolin’s actual innocence claim under Claim Twenty-four is not cognizable in a federal habeas proceeding. The Supreme Court has yet to decide whether a state prisoner can obtain federal habeas relief based on a freestanding claim of actual innocence. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, — U.S. —, —, 129 S.Ct. 2308, 2321 (2009). Because Bolin has failed to exhaust his state court remedies for this claim, the court need not resolve the issue here.

5. Procedural default

A federal court will not review a claim for habeas corpus relief if the decision of the state court denying the claim rested on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). The Court in *Coleman* stated the effect of a procedural default as follows:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986).

A state procedural bar is "independent" if the state court explicitly invokes the procedural

rule as a separate basis for its decision. *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir. 1995). A state court's decision is not "independent" if the application of a state's default rule depends on a consideration of federal law. *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000). Also, if the state court's decision fails "to specify which claims were barred for which reasons," the Ninth Circuit has held that the ambiguity may serve to defeat the independence of the state procedural bar. *Valerio v. Crawford*, 306 F.3d 742, 775 (9th Cir. 2002); *Koerner v. Grigas*, 328 F.3d 1039, 1050 (9th Cir. 2003). A state procedural rule is "adequate" if it is "clear, consistently applied, and well-established at the time of the petitioner's purported default." *Calderon v. United States Dist. Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (citation and internal quotation marks omitted).

Respondents argue that, to the extent they are exhausted, Claims Eleven and Twenty-six are procedurally defaulted because the claims were not raised until Bolin's state post-conviction proceeding in which the Nevada Supreme Court applied Nev. Rev. Stat. § 34.810(1)(b)(2)⁶ to conclude that the claims had been waived by Bolin's failure to raise them on direct appeal. The Ninth Circuit has concluded that Nev. Rev. Stat. § 34.810 is an inadequate state procedural bar to federal habeas review in capital habeas cases. *See Sechrest v. Ignacio*, 549 F.3d 789, 803 (9th Cir. 2008) (relying on *Valerio*, 306 F.3d at 778). Also, with respect to Claim Twenty-six, the Nevada Supreme Court issued a decision after Bolin's direct appeal had concluded in which it acknowledged the ambiguity in Nevada law regarding the appropriate time to raise ineffective assistance of counsel

⁶ Nev. Rev. Stat. § 34.810(1)(b)(2) provides as follows:

1. The court shall dismiss a petition if the court determines that:

...

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

...

(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief[.]

...

1 claims and clarified that they are properly raised for the first time in a timely first post-conviction
2 petition. *Pellegrini v. State*, 34 P.3d 519, 534-35 (Nev. 2001).

3 While Bolin did not directly raise the issue in opposing respondents' motion to dismiss,
4 the holdings of *Valerio* and *Pellegrini* are well known to the court and sufficient to call into question
5 the adequacy of Nev. Rev. Stat. 34.810(1)(b)(2) as bar to federal review. Because the respondents
6 have not convinced the court that the rule is adequate notwithstanding authority to the contrary, the
7 court is not procedurally barred from considering Claims Eleven and Twenty-six. *See King v.*
8 *Lamarque*, 464 F.3d 963, 767 (9th Cir. 2006) (noting that the government ultimately carries the
9 burden to demonstrate that the state rule is an adequate procedural bar).

10 **IT IS THEREFORE ORDERED** that respondent's motion to dismiss (docket #59) is
11 GRANTED in part and DENIED in part.

12 **IT IS FURTHER ORDERED** that Claims Thirty-two, Thirty-five through Forty-three,
13 Forty-five, and Forty-eight through Fifty-one are **DISMISSED** for the reasons set forth above.

14 **IT IS FURTHER ORDERED** that petitioner shall have **twenty (20) days** from the date this
15 order is entered within which to file a Notice of Abandonment of Unexhausted Claims, indicating
16 that Claims One through Four, Seven, Twelve through Fourteen, Eighteen through Twenty-two,
17 Twenty-four, Twenty-five, Twenty-eight through Thirty-one, Thirty-three, Thirty-four, Forty-four,
18 Forty-six, Forty-seven, Fifty-two, Fifty-four, and Fifty-five are to be deleted from his second
19 amended petition (docket #49). Additional unexhausted claims to be included in the Notice of
20 Abandonment are the portion of Claim Eleven challenging the State's handling of evidence gathered
21 from the victim's pickup truck and all of Claim Fifty-three except for petitioner's claim of
22 ineffective assistance based on appellate counsel's alleged failure to challenge "prior bad acts"
23 evidence and the State's purported suppression of potentially exculpatory evidence.

24 **IT IS FURTHER ORDERED** that, if petitioner does not abandon his unexhausted claims
25 within the time allowed, the second amended petition (docket #49) shall be dismissed under *Rose v.*
26 *Lundy*, 455 U.S. 509 (1982).

